No. 83-634

In the Supreme Court of the United States

OCTOBER TERM, 1983

CALIFORNIA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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Petitioner contends that the court of appeals erred in requiring it to bear the expense of compliance with a writ of habeas corpus ad testificandum in the trial of a state prisoner's suit under 42 U.S.C. (Supp. V) 1983.

1. This action began when a state prison inmate, Weldon Wiggins, brought two Section 1983 suits, subsequently consolidated, against the County of Alameda and several county officials, to challenge conditions in the county's pretrial detention center where he had been incarcerated for a time (Pet. 4). The district court assigned the proceedings to a magistrate, who issued a writ of habeas corpus ad testificandum to the California State Director of Corrections, the warden of the prison where Wiggins was incarcerated, and the United States Marshal (Excerpt of Record 30). In a memorandum order accompanying the writ, the magistrate explicitly stated that the state prison officials were responsible for transporting and housing Wiggins as

well as guarding him during the trial (*ibid.*). The U.S. Marshal was to provide assistance for security dependent on the availability of his personnel. The magistrate directed, however, that the Marshal should have no responsibility for producing the plaintiff pursuant to the writ (Pet. 6). In its return, petitioner requested that the magistrate modify his order to make the Marshal responsible for transporting Wiggins from the nearest state prison to the federal courtroom, and for courtroom security (*ibid.*).

The magistrate took no action on the state's request prior to the trial, at which Wiggins was guarded by state officers. After the trial but before entry of judgment, the magistrate issued an order denying the state's request for reimbursement from the Marshal (Pet. 7). Petitioner then appealed.

Petitioner argued that the court of appeals had jurisdiction under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). On the merits, it asserted that the request for reimbursement should be granted in light of this Court's decision in *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977). That case, petitioner argued, allowed a federal court to impose duties like the one at issue upon a third party only when compliance would not be an unreasonable burden (Pet. App. 2, 13-14).

The court of appeals concluded that it had jurisdiction to hear the appeal, but rejected petitioner's request for reimbursement (Pet. App. 5, 11). Agreeing with the Third Circuit's reasoning in *Story* v. *Robinson*, 689 F.2d 1176 (1982), the court held that (Pet. App. 8):

> [w]here there is no statutory authority requiring the United States to transport and guard a prisoner called as a witness by a validly issued federal writ or authorizing reimbursement to the state for the costs of compliance with such a writ, then there is no basis upon which the state can seek compensation for its expenses.

The court noted that the ad testificandum writ "is specifically and independently authorized by 28 U.S.C. § 2241(c)(5)" and thus "the principles developed under § 1651(a), including the rule of *New York Telephone*, do not control" (Pet. App. 14).

2. The decision of the court of appeals is correct, and conflicts with no decision of this Court or of any other court of appeals. Further review is unwarranted.

a. Petitioner asserts (Pet. 13) that the magistrate's order accompanying the writ and the order denying reimbursement imposed a liability on the state treasury and therefore were barred by the Eleventh Amendment.[1] Petitioner misapprehends the nature of the Eleventh Amendment's bar on actions against states. The Eleventh Amendment restricts the authority of the federal courts to entertain suits against a state by citizens of another state. But this Court has recognized "that the Eleventh Amendment [is] no bar to a suit by the United States against a State." *Edelman* v. *Jordan*, 415 U.S. 651, 669 (1974), citing *Monaco* v. *Mississippi*, 292 U.S. 313 (1934). Insofar as this case involves a dispute between the United States Marshals Service and petitioner, it is an action between the United States and a state that is not subject to the bar of the Eleventh Amendment.[2]

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[1]Petitioner did not raise this issue in the district court or the court of appeals, where its only claim was that the magistrate had abused his discretion in refusing to divide costs between the State and the United States (Pet. App. 6). See *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 466-469 (1945).

[2]Petitioner notes that "the writ and the accompanying order were directed to the superintendent of the custodial facility at which Wiggins was then housed," and not to the California Department of Corrections (Pet. 15). See Excerpt of Record 30. That being so, it may be doubted whether the Eleventh Amendment would bar the magistrate's order even if this action were not seen as a dispute between the United States

Petitioner does not contend that the Eleventh Amendment was a bar to the underlying civil rights action by Wiggins. The issuance of the writ and the accompanying order were a natural corollary of that action and necessarily within the magistrate's power to try the action. 28 U.S.C. 2243. It was entirely appropriate to impose these incidental burdens on the State rather than on the federal government. This was a suit against the County of Alameda, a unit of state government, and county officials for acts taken under color of state law, and the plaintiff was in the custody and control of the State. By contrast, the federal government was a stranger to the controversy.

b. Petitioner argues that the court of appeals' decision conflicts with the decision of the Seventh Circuit in *Ford* v. *Carballo*, 577 F.2d 404 (1978), and with this Court's decision in *United States* v. *New York Telephone Co., supra.*

In *Ford*, the Seventh Circuit held that the correct standard for review was whether the district court had abused its discretion in issuing a writ of habeas corpus ad prosequendum without allowing for reimbursement of the costs incurred by the state in complying with the writ. The court then decided on the particular facts of that case that failure to allow reimbursement had been an abuse of discretion. 577 F.2d at 408. In this case, the Ninth Circuit similarly held that the standard for review was whether the magistrate had abused his discretion in issuing the writ without authorizing

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and the Department. After all, injunctive relief is available against a state officer notwithstanding the bar of the Amendment. *Ex parte Young*, 209 U.S. 123 (1908). And that is true even though compliance with the court's direction may have a significant impact on the state treasury. *Edelman* v. *Jordan*, 415 U.S. at 667. Moreover, the writ issued here—like the order in *Ex parte Young* and unlike that disapproved in *Edelman* v. *Jordan*—was prospective in nature, directing a state officer to undertake future conduct.

reimbursement.[3] While the Ninth Circuit held that there had been no abuse of discretion in the magistrate's refusal to allow reimbursement, the court explicitly stated that the outcome approved in *Ford* would have been equally permissible (Pet. App. 10).

We note, moreover, that the Seventh Circuit's decision in *Ford* has not since been cited by either the court of appeals or the district courts in that circuit, so that we are without further guidance on the extent of discretion that case leaves to district judges in the matter of reimbursement. In *Ford* itself the court noted that "the state has documented well the burden that transporting a prisoner presents in terms of allocation of staff and financial resources" (577 F.2d at 408). It may be that the showing in this case was less convincing; it may also be that a weaker showing in future Seventh Circuit cases will result in denial of reimbursement, particularly since, as we noted above, *Ford* holds that the question is left to the discretion of the district court.

Nor is the decision here inconsistent with this Court's decision in *United States* v. *New York Telephone Co., supra*. In that case the Court held that an order directing the company to assist in the installation of pen registers "was clearly authorized by the All Writs Act [28 U.S.C. 1651(a)]." 434 U.S. at 172. It is true that the Court also found that compliance with the order would not be burdensome for the company, since reimbursement was provided (*id.* at 175). But the fact that petitioner was not awarded reimbursement is of little import in light of the different statutory scheme applicable here. The habeas corpus statute provides that (28 U.S.C. 243 (emphasis added)):

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[3]We submit, contrary to what both courts have said, that the abuse of discretion standard should apply only to the issuance of the writ, and that the state (as custodian of the prisoner) should be required to bear the costs of compliance.

> The writ * * * shall be directed *to the person having custody* of the person detained.
>
> * * * * *
>
> *[T]he person to whom the writ is directed* shall be required to produce at the hearing the body of the person detained.

In light of this explicit language, there is little room for petitioner to argue that Congress did not contemplate the imposition on state wardens of incidental burdens like that involved here.

c. We note, finally, the irony of the claim in this case. The State's Department of Corrections, though claiming the shelter of the Eleventh Amendment, is in reality itself asserting here a claim for money damages against the United States. The Department has made no showing that the United States has waived its sovereign immunity from claims of that sort. Moreover, as noted above, the actions for which the Department claims reimbursement were taken in aid of a suit by a state prisoner against officials in the State of California for acts done under color of state law (42 U.S.C. (Supp. V) 1983). The identical suit could just as well have been filed in state court (see *Maine* v. *Thiboutot*, 448 U.S. 1, 3 n.1 (1980)), in which case it would be frivolous to argue that the United States had any obligation to reimburse the Department for the costs of transporting and guarding its prisoner. The fact that the United States provides a forum for the resolution of disputes like that between Wiggins and the County of Alameda should hardly subject the United States to the duty of paying costs associated with litigation to which it is not a party.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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